89-308

No. _____

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CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

FUKOKU KOGYO CO., LTD. AND HACHIRO SATO,

*Petitioners*,

—v.—

C. ITOH & CO., LTD.,

*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

Lloyd DeVos
(*Counsel of Record*)
Andrew W. Heymann
DE VOS & CO.
One World Financial Center
19th Floor
200 Liberty Street
New York, New York 10281
(212) 786-1000

*Attorneys for Petitioners*

August 1989

## QUESTION PRESENTED

The United States District Court, District of New Jersey, held that it would not pierce the corporate veil between C. Itoh & Co., Ltd., a large multinational Japanese trading company, and C. Itoh & Co. (America) Inc., its wholly owned and economically integrated distribution subsidiary, under the stringent principles enunciated in *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), for the purpose of finding general *in personam* jurisdiction over C. Itoh & Co., Ltd.[1]

A panel of the United States Court of Appeals for the Third Circuit affirmed this decision without opinion.

The question presented for review by this Court is whether the United States Court of Appeals for the Third Circuit properly upheld the *Cannon* alter ego test, precluding an analysis of the nature and degree of control of the activities of the domestic subsidiary by the foreign parent to determine whether the assertion of personal jurisdiction over the foreign parent corporation would offend traditional notions of substantial justice and fair play under *International Shoe* and its progeny.

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1 The following parties not named in this petition are parties to the proceedings below: C. Itoh & Co. (America) Inc., Enprotech Corp., George Ikeda, Ryujiro Kitamura, William Renda, Sakae Iimuro and FKC America Inc. The alignment of the parties is set forth at Appendix A (App. 1a).

Petitioner Fukoku, Fourth Party Defendant in the proceedings below, has one wholly-owned subsidiary corporation, but does not otherwise have any parent companies, subsidiaries or affiliates.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

No. _____

FUKOKU KOGYO CO., LTD. AND HACHIRO SATO,

*Petitioners,*

—v.—

C. ITOH & CO., LTD.,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

### OPINIONS BELOW

The United States District Court, District of New Jersey held that under the veil piercing analysis set forth in *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), it would not attribute the forum related activities of the wholly owned United States subsidiary corporations of C. Itoh & Co. (Japan) Ltd. to their foreign parent, precluding an analysis of the nature and degree of control of the activities of the domestic subsidiary by the foreign parent to determine whether the assertion of personal jurisdiction over the foreign parent corporation would offend traditional notions of substantial justice and fair play under *International Shoe* and its progeny (App. 13-17c).

On appeal to the United States Court of Appeals for the Third Circuit, the Court of Appeals affirmed the decision of the District Court in a one sentence Judgment Order (App. 1a).

## JURISDICTION

The Judgment Order of the Court of Appeals was entered on June 21, 1989. The Court of Appeals denied petitioners' Petition for Rehearing on July 17, 1989. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of the Fifth and Fourteenth Amendments of the Constitution of the United States, Fed. R. Civ. P. 4(d)(3) and N. J. Civil Practice Rule 4:4-4, all of which are set forth in the Appendix.

## STATEMENT OF THE CASE

Respondent C. Itoh & Co., Ltd. (hereinafter "C. Itoh (Japan)"), a Japanese corporation, is one of the world's largest international trading companies. It traditionally acts as a sales outlet to the international market for goods produced by Japanese manufacturers. C. Itoh (Japan) distributes these products through an integrated marketing network comprised of itself and its subsidiary corporations located around the world.

Fukoku Kogyo Co., Ltd. (hereinafter "Fukoku") is a Japanese corporation that manufactures and sells a sophisticated environmental technology product called the FKC Screw Press which incorporates its proprietary patented technology. In the course of the four years preceding this litigation, Fukoku entered into nine transactions with C. Itoh (Japan) supplying its products in Japan for distribution to the North American market.

Two of Respondent's wholly owned and economically integrated subsidiary corporations, C. Itoh & Co. (America) Inc. and Enprotech Corp., commenced an action in the United States District Court, District of New Jersey against Petitioners. C. Itoh (Japan)'s United States subsidiary corporations are authorized to conduct business in the State of New Jersey and regulary distribute C. Itoh (Japan)'s products in concert and in cooperation with C. Itoh (Japan) in the State of New Jersey. Included in the claims made against Fukoku by the wholly owned subsidiaries were breach of an alleged exclusive distribution agreement, interference with prospective economic advantage and inducement to breach the fiduciary relationship of a former employee.

In the action commenced in the District Court of New Jersey, Petitioners plead counterclaims alleging a course of conduct directed, supervised and authorized by C. Itoh (Japan) to exclude Fukoku from pursuing its legitimate business interests in the North American market.

The District Court denied the request of the C. Itoh subsidiary corporations to dismiss these counterclaims (App. 30c). The District Court, however, held that it would not pierce the corporate veil and would not attribute the forum contacts of the C. Itoh subsidiary corporations to C. Itoh (Japan) (App. 13-16c). The District Court denied Petitioner Fukoku's request to conduct any discovery from C. Itoh (Japan) to further establish the degree of interdependence and control between C. Itoh (Japan) and its wholly owned United States corporations doing business in New Jersey. The District Court dismissed all claims against C. Itoh (Japan) for lack of *in personam* jurisdiction (App. 31c).

In a one sentence Judgment Order, the United States Court of Appeals for the Third Circuit affirmed the Order of the District Court dismissing the claims against C. Itoh (Japan) for lack of *in personam* jurisdiction (App. 1a).

## REASONS FOR GRANTING THE PETITION

The decision below dismissing the claims against C. Itoh (Japan) incorrectly rests on the stringent alter ego theory of *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), a theory that has produced conflicting results among the Circuits and which does not conform to the less formalistic "minimum contacts" due process standard established by this Court in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), and subsequent cases.

The District Court's reliance on the rule of *Cannon*, which was affirmed and adopted by the Court of Appeals in a one sentence opinion, to the preclusion of the minimum contacts analysis set forth in *International Shoe*, transforms the rule of statutory interpretation in *Cannon* into a constitutional test of due process minimum contacts for the purposes of personal jurisdiction (App. 14-16c).

The elevation of *Cannon* into a constitutional principle is unsound because *Cannon* did not involve the question of whether the activities of the subsidiary in the forum state constitute sufficient minimum contacts with the parent to invoke personal jurisdiction over the parent pursuant to the forum's long-arm statute. The decision in *Cannon* similarly did not address the constitutional considerations of due process in the assertion of jurisdiction over the foreign parent. 267 U.S. at 336. Moreover, the decision in *Cannon* rests on the "presence" test for jurisdiction which was superseded by this Court in *International Shoe*. *See Cannon*, 267 U.S. at 334, 335.

This Court has not considered specifically the application of the *International Shoe* "fair play and substantial justice" minimum contacts standard to the foreign parent-domestic subsidiary jurisdiction problem presented in *Cannon*.[1]

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1 In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 n.22 (1985), this Court touched upon the significance of the legal relationship between corporations for jurisdictional purposes. The Court indicated that commercial activities "carried on in behalf" of an out-of-state

The Third Circuit has adopted a strict version of the *Cannon* alter ego theory and applies this theory to *Cannon*-type jurisdictional questions. Previously, the Third Circuit held that a corporation may be subject to jurisdiction by virtue of its relationship with its local subsidiary where the subsidiary acts as an alter ego or agent of the parent, or because the "independence of the separate corporate entities was disregarded." *Lucas v. Gulf & Western Industries, Inc.*, 666 F.2d 800, 806 (3d Cir. 1981). This same standard was applied in the form of the *Cannon* alter ego test in the present case. The decision of the Third Circuit in the present case begs the question whether the strict veil piercing test of *Cannon* is mandated by the due process clause. *See* 2 *Moore's Federal Practice* Paragraph 4.41-1[6], at 4-375 (1989).

The First, Fifth, Seventh and Tenth Circuits likewise have adopted a strict alter ego analysis when resolving *Cannon*-type jurisdictional problems. These Circuits adhere to the proposition that the acts of a subsidiary will not subject the foreign parent to the jurisdiction of the state where the subsidiary is doing business, so long as the formal separation between companies has been maintained. *See, e.g., Miller v. Honda Motor Co., Ltd.*, 779 F.2d 769 (1st Cir. 1985);[2] *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983); *Van Dorn Corp. v. Future Chemical & Oil Corp.*, 753 F.2d 565, 570 (7th Cir. 1985);[3]

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party may be attributed to the foreign party. *Id.* In *Burger King*, however, the Court was not required to resolve the question of the "permissible bounds of such attribution" and the question remains unresolved.

2 The Court in *Miller*, however, does not address its earlier decision in *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437, 440 (1st Cir.), *cert. denied*, 385 U.S. 919 (1966), where the Court recognized that although interlocking directorates and officers in themselves are not sufficient for jurisdictional purposes, they are relevant factors to be considered under *International Shoe*.

3 The Seventh and Tenth Circuits utilize an alter ego test for jurisdictional purposes that is virtually identical to the alter ego analysis they apply for purposes of liability. The Seventh Circuit's alter ego liability test was impliedly adopted by the Third Circuit in this case (App. 1a, 20a).

*Quarles v. Fugua Indus., Inc.*, 504 F.2d 1358, 1362 (10th Cir. 1974).[4]

The Sixth Circuit has attempted to qualify or distinguish the harsh effects of *Cannon*. In *Velandra v. Regie Nationale des Usines Renault*, 336 F.2d 292, 296 (6th Cir. 1964) the Court explained that:

> the ruling in the *Cannon* case, if not qualified by the subsequent ruling in the *International Shoe Company* case, has been at least qualified in later cases holding foreign corporations amenable to the personal jurisdiction of local courts because of the local activities of subsidiary corporations upon the theory that the corporate separation is fictitious, or that the parent has held the subsidiary out as its agent, or, more vaguely, that the parent has exercised an undue degree of control over the subsidiary.

*Id.* (citations omitted).

The Sixth Circuit noted that the law relating to agency and separate corporate entities was developed for purposes other than to determine amenability to personal jurisdiction, and the application of these bodies of law to questions of personal jurisdiction merely confuses the matter. *Velandra*, *supra*, 336 F.2d at 297. "The point is, of course, that an analytical rather than a mechanical or formalistic approach is appropriate upon the issue of personal jurisdiction based upon the ownership of stock of a corporation carrying on local activities." *Id.* at 297 n.21.

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4 The Court in *Quarles* attempted to distinguish its earlier decision in *Curtis Publishing Company v. Cassel*, 302 F.2d 132, 137 (10th Cir. 1962), which applied the minimum contacts test in finding that the subsidiary was an agent of the parent subjecting the parent to *in personam* jurisdiction. 504 F.2d at 1364 (distinguishing *Curtis* because the subsidiary in *Curtis* conducted the same type of business as did its foreign parent corporation). The *Quarles* decision is also difficult to square with the earlier decision in *Massey-Ferguson Ltd. v. Intermountain Ford Tractor Sales Co.*, 325 F.2d 713 (10th Cir. 1963) (per curiam), *cert. denied*, 377 U.S. 931 (1964) (Canadian corporation subject to jurisdiction in Utah because of the "interlocking and integrated control" of its Utah subsidiary).

The Second Circuit has developed a test distinguishing or qualifying *Cannon*. This test asks whether through corporate interdependence the foreign parent effectively "controls" the activities of the domestic subsidiary. The Second Circuit has explained this minimum contacts analysis as containing one "essential" element (common ownership) and three "important" factors (the degree of financial dependency, the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities, and the degree of control over the marketing and operational policies of the subsidiary exercised by the parent corporation). *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120-22 (2d Cir. 1984); *see also Boryk v. deHavilland Aircraft Co.*, 341 F.2d 666, 668 (2d Cir. 1965) (observing "New York's steady movement towards holding, that in determining whether a corporation has engaged in activities in the state, it is immaterial whether these are conducted through a branch or through a subsidiary corporation, even though the latter's formal independence has been scrupulously preserved").

The Fourth Circuit has expressed outright dissatisfaction with the rigid requirements of the *Cannon* doctrine. *Harris v. Deere and Company*, 223 F.2d 161, 163 (4th Cir. 1955) (per curiam) (noting that "[t]he fiction of different corporate entities ought not permit the manufacturer . . . to avoid suit in the states where its product is being sold and where the wholly owned and controlled subsidiary is representing it just as truly as if it were an agent in the legal sense; and we would so hold if we felt ourselves at liberty to do so").

The Ninth and Eleventh Circuits have addressed the foreign parent-domestic subsidiary jurisdictional question from the perspective of an agency relationship. *See, e.g., Wells Fargo & Company v. Wells Fargo Express Company*, 556 F.2d 406, 425-26 (9th Cir. 1977); *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 750 F.2d 1516, 1521-22 (11th Cir. 1985). The Ninth Circuit in *Wells Fargo, supra*, 556 F.2d 419, stated that the domestic subsidiary may be deemed to be an "agent" or instrumentality" of the foreign parent when it performs an allegedly wrong-

ful act in the forum on behalf of the foreign parent; this agency relationship may subject the foreign parent to the court's specific jurisdiction.[5] The Court in *Wells Fargo* further identified the theory of "general agency" for jurisdictional purposes, which is similar to the alter ego or control test in that it permits the Court to entertain general jurisdiction over the foreign parent. *Id.* at 420.[6]

Five district courts in different circuits, in well-reasoned decisions, have applied a minimum contacts standard to *Cannon*-type jurisdictional questions. Exhaustive studies of the economic integration of large Japanese multinational trading companies for jurisdictional purposes were conducted by Judge Weinstein in *Bulova Watch Co. v. K. Hattori & Co., Ltd.*, 508 F. Supp. 1322, 1338-40 (E.D.N.Y. 1981) and Judge Higginbotham in *Zenith Radio Corp. v. Matsushita Elec. Ind. Co., Ltd.*, 402 F. Supp. 262 (E.D. Pa. 1975). *See also Newport Components, Inc. v. NEC Home Electronics (U.S.A.), Inc.*, 671 F. Supp. 1525 (C.D. Cal. 1987); *Hitt v. Nissan*, 399 F. Supp. 838 (S.D. Fla. 1975). In a case involving numerous Japanese multinational trading companies, which is representative of the standard developed by these district courts, the District Court of Oregon identified a number of factors as relevant to the determination of whether the foreign parent "controls" the domestic subsidiary corporation:

> (1) Whether there is a world-wide partnership in business competition between the parent and subsidiary; (2) whether the parent has the capacity to influence decisions of the subsidiary in matters having antitrust consequences (e.g., interlocking directors and officers); (3) whether there is an integrated manufacturing, sales

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5 The Court in *Wells Fargo* noted that in the parent-subsidiary context it may be even easier to establish the requisite "agency control." 556 F.2d at 419 (citations omitted).

6 The Court stated that while most cases talk of piercing the veil, the existence of an intercorporate agency is an "independently sufficient" basis for the assertion of long-arm jurisdiction. 556 F.2d at 420 n.13. *See also* Restatement (Second) of Conflicts of Laws Section 52 Comment b (1971).

> and distribution system; and (4) whether the subsidiary is the marketing arm of the parent and shares a common marketing image (e.g., through advertising and a common trademark).

*Cascade Steel v. C. Itoh & Co. (America)*, 499 F. Supp. 829, 838 (D. Ore. 1980), *citing Zenith Radio Corp.*, *supra*, 402 F. Supp. at 327-28.

These courts have delineated a comprehensive set of factors to determine the degree and type of control necessary to attribute the forum activities of the subsidiary to the foreign parent corporation. In so doing, they have adopted a view that considers the "totality of the relationship" between the parent and the subsidiary.

C. Itoh (Japan) is a traditional Japanese "Sogo Shosha" (Trading Company), an economically integrated worldwide trading enterprise. C. Itoh (Japan) is a multibillion dollar company. Its United States subsidiaries distribute the products acquired for distribution by C. Itoh (Japan). One of these subsidiaries, C. Itoh & Co. (America) Inc., generates billions of dollars from the distribution of these products to the American market. C. Itoh & Co. (America) Inc. and Enprotech Corp., the wholly owned subsidiaries of C. Itoh (Japan), are authorized to conduct business in the State of New Jersey and regularly transact business there.

Due process is not offended by requiring C. Itoh (Japan) to appear in the forum state where its subsidiaries have caused injury to Fukoku in the course of carrying out activities on its behalf. The alter ego theory should not become a constitutional basis for precluding jurisdiction over a foreign parent corporation where the minimum contacts standard of *International Shoe* may otherwise be met.

New Jersey's "long-arm" jurisdictional statute, New Jersey Civil Practice Rule 4:4-4, has been held to permit service on a nonresident defendant to the uttermost limits permitted by the United States Constitution. *De James v. Magnificence Carriers, Inc.*, 654 F.2d 280, 284 (3d Cir. 1981), *cert. denied*, 454 U.S.

1085 (1981). The formal separation of the parent and subsidiary corporation should not raise a barrier to the exercise of jurisdiction over the foreign parent corporation, such as C. Itoh (Japan), given the "totality of the relationship" with its domestic subsidiary in the forum.

There is little doubt that C. Itoh (Japan) derives substantial commercial benefit from the activities conducted in the forum by its subsidiary corporations. The receipt of these benefits is at least indicative of a nexus by C. Itoh (Japan) with the forum and should be considered in the overall evaluation of the fairness and reasonableness of exercising jurisdiction. The Third Circuit erred when it foreclosed this analysis by affirming the dismissal of C. Itoh (Japan) for lack of *in personam* jurisdiction simply because the requirements of the strict alter ego (liability) test had not been satisfied.

## CONCLUSION

For the foregoing reasons, Petitioners, Fukoku Kogyo Co., Ltd. and Hachiro Sato, submit that the United States Court of Appeals erred in adopting the *Cannon* veil piercing doctrine to determine whether the District Court acquired *in personam* jurisdiction over C. Itoh (Japan) and respectfully urge this Court to grant the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

Dated: August 21, 1989

Respectfully submitted,

/s/ LLOYD DE VOS

Lloyd De Vos
(Counsel of Record)
Andrew W. Heymann
For De Vos & Co.
One World Financial Center
19th Floor
200 Liberty Street
New York, New York 10281
(212) 786-1000

# APPENDICES

**Appendix A**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 89-5177

ENPROTECH CORPORATION

v.

WILLIAM RENDA, FKC AMERICA, INC., SAKAE IIMURO, HACHIRO SATO, and FUKOKU KOGYO, CO., LTD.

and

WILLIAM RENDA,

*3d Party Plaintiff*

v.

C. ITOH & COMPANY (AMERICA) INC.,

*4th Party Defendant*

v.

C. ITOH & COMPANY (AMERICA) INC.,

*4th Party Plaintiff*

v.

SAKAE IIMURO, FKC AMERICA INC., FUKOKU KOGYO, CO., LTD. and HACHIRO SATO

*4th Party Defendants*

v.

FOKOKU KOGYO CO. LTD and HACHIRO SATO

*5th Party Plaintiffs*

v.

ENPROTECH CORP., C. ITOH & CO. (AMERICA) INC., C. ITOH & CO. (JAPAN) LTD., R. KITAMURA, R. MORITA AND G. IKEDA,

*5th Party Defendants*

*Fokoku Kogyo Co., Ltd. and Hachiro Sato,*
*Appellants in No. 89-5177*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 87-1444)
District Judge: Honorable John W. Bissell

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Argued June 13, 1989

Before: SLOVITER, COWEN, and WEIS,
*Circuit Judges*

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JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the order of the district court entered November 10, 1988 be and the same is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

/s/ WEIS
Circuit Judge

Attest:

/s/ SALLY MRVOS
Clerk

Date: Jun 21 1989

**Appendix B**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 89-5177

ENPROTECH CORP. and C. ITOH & CO. (AMERICA) INC.,

v.

WILLIAM RENDA, et al.
FUKOKU KOGYO CO., LTD. and HACHIRO SATO,

*Appellants*

v.

C. ITOH & CO., LTD. and RYUJIRO MORITA

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and WEIS,* *Circuit Judges*

The petition for rehearing filed by Appellants, Fukoku Kogyo Co., Ltd. and Hachiro Sato in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service

* Hon. Joseph F. Weis, Jr., Senior Circuit Judge, as to panel rehearing only.

not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ DOLORES SLOVITER
Circuit Judge

Dated: July 17, 1989

**Appendix C**

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 87-1444

ENPROTECH CORP.,

*Plaintiff*,

v.

WILLIAM RENDA, et al.,

*Defendants*,

v.

C. ITOH & COMPANY (AMERICA), INC.,

*Defendant on Counterclaim.*

C. ITOH & COMPANY (AMERICA), INC.,

*Fourth-Party Plaintiff*,

v.

SAKAE IIMURO, et al.,

*Fourth-Party Defendants.*

FUKOKU KOGYO LTD. and HACHIRO SATO,

*Fifth-Party Plaintiffs and Counterclaimants*,

v.

ENPROTECH CORP. and C. ITOH & COMPANY (AMERICA), INC.,

*Defendants on Counterclaim*,

and

C. ITOH & COMPANY (JAPAN), INC., R. MORITA, GEORGE IKEDA and RYUJI KITAMURA,

*Fifth-Party Defendants.*

APPEARANCES:

CRUMMY, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE
By: Guy V. Amoresano, Esquire
One Gateway Center
Newark, New Jersey 07102
(Attorneys for Plaintiff
Enprotech Corp. and Fourth-Party
Plaintiff C. Itoh & Co. (America) Inc.)

RIKER, DANZIG, SCHERER, HYLAND & PERRETTI
By: Glenn A. Clark, Esquire
Headquarters Plaza
One Speedwell Avenue
CN 1981
Morristown, New Jersey 07960-1981
(Attorneys for Defendant FKC America)

DE VOS & CO.
By: Lloyd De Vos, Esquire
1445 Forest Court
Mountainside, New Jersey 07092
(Attorneys for Defendants
Fukoku Kogyo Co., Ltd. and
Hachiro Sato)

CONNELL & TAYLOR
Elizabeth M. Taylor, Esquire
535 Fifth Avenue
New York, New York 10017

and

ROBINSON, WAYNE & LA SALA
By: Paul J. Linker, Esquire
One Gateway Center
P.O. Box 717
Newark, New Jersey 07102
(Attorneys for Fifth-Party
Defendants C. Itoh & Co., Ltd.
and R. Morita)

BISSELL, *District Judge*

The factual and procedural history of this case has been set forth in detail in several previous motions. For the purposes of this motion, it would be helpful to summarize the course of the pleadings. Originally Enprotech brought suit against FKC America, Renda and Iimuro and then added Sato and FKC Japan as direct defendants. Renda filed a third-party complaint against C. Itoh (America). C. Itoh (America) then filed a counterclaim against Renda and a fourth-party complaint against Iimuro, FKC America, FKC Japan and Sato. Now defendants Sato and FKC Japan have filed a "fifth-party complaint" against C. Itoh & Co. Ltd. (C. Itoh (Japan)); George Ikeda, General Counsel of Enprotech; Ryuji Kitamura, President of Enprotech and Senior Vice President of C. Itoh (America) and Morita, an employee of C. Itoh Japan. Defendants have also asserted counterclaims identical to the fifth-party complaint against Enprotech and C. Itoh America.[1]

The gravamen of the counterclaims is that those parties named conspired and falsely told third parties with whom FKC Japan dealt or wished to deal, that FKC Japan was subject to the terms of the preliminary injunction before it has been named as a party; that Enprotech had an exclusive distibutorship agreement with FKC Japan; and that FKC Japan had conspired to steal Enprotech's business. These misrepresentations

1 The term "fifth-party complaint" is a misnomer. In reality, C. Itoh (Japan), Ikeda, Kitamura and Morita are additional defendants on these counterclaims and hereafter will be designated (along with Enprotech and C. Itoh (America)) as counterclaim defendants.

impaired FKC's ongoing and prospective business relationships. Further, the counterclaim defendants conspired to deprive FKC Japan of its ability to sell by not seeking to obtain orders from those customers FKC Japan was forbidden to contact. Specifically, the claims (sprinkled throughout six counts) allege defamation, interference with contractual relationships, interference with prospective economic advantage, abuse of process, malicious prosecution, and misrepresentation or fraud.

Presently before the Court are the following motions:

1. Enprotech, C. Itoh (America), Kitamura and Ikeda's motion to dismiss the counterclaims for failure to state a claim upon which relief may be granted.

2. Kitamura and Ikeda's motion to dismiss pursuant to Fed. R. Civ. P. 14 or in the alternative for lack of subject matter jurisdiction.

3. The cross-motion of defendants Sato and FKC Japan to dismiss the original complaint for lack of subject matter jurisdiction, or in the alternative for partial summary judgment.

4. The motion of C. Itoh (Japan) and Morita (an employee of C. Itoh (Japan)) to dismiss for lack of personal jurisdiction and insufficiency of service of process.

5. Plaintiff's appeal from Magistrate Haneke's June 18, 1988 order.

At oral argument on September 2, 1988, this Court ruled upon a number of these motions from the bench. The claims against Morita were dismissed for lack of *in personam* jurisdiction over that individual. C. Itoh (Japan)'s motion to dismiss based upon lack of *in personam* jurisdiction or insufficiency of service of process was, however, taken under advisement. The counterclaim-defendants' motion to dismiss the counterclaim for malicious prosecution was granted, and that claim was dismissed without prejudice on the ground that it is (at best) premature. The motions to dismiss the counterclaims sounding in abuse of process and tortious interference with prospective eco-

nomic advantage were denied. The counterclaims for fraud, defamation and tortious interference with contract were also dismissed under certain conditions expressed in court. (*See* Tr. 9/2/88 at 70:14-72:10). The Court also denied the counterclaimants' motion to realign C. Itoh (Japan) as a party plaintiff thereby destroying diversity jurisdiction as to the claims of the plaintiffs (and hence the entire action). Decision was reserved upon the motions of Sato, Ikeda and Kitamura that claims may not be maintained against them individually and upon the motion of all counterclaim defendants due to lack of subject matter jurisdiction. Finally, the Court determined that it would decide the appeal from Magistrate Haneke's order of June 18, 1988 upon papers submitted and to be submitted shortly after September 2. This opinion will dispose of the motions left undecided as of that date and may also amplify some of the rulings made from the bench.

*1. Rule 12(b)(6) Motions to Dismiss.*

"When assessing a Rule 12(b) motion to dismiss, the court must accept as true all factual allegations in the complaint and view them in a light most favorable to plaintiff. A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiff can prove no set of facts in support of this claim which would entitle him to relief." *Kronfeld v. First Jersey National Bank*, 638 F. Supp. 1454, 1461 (D.N.J. 1986).

*A. Malicious Prosecution*

Malicious prosecution occurs where one party commences an action against another without justification. Defendants allege that plaintiff unlawfully commenced an action for breach of an exclusive distributorship agreement that never existed (Counts 3 and 4). This cause of action is dismissed without prejudice as premature.[2] New Jersey requires favorable termination of the

2 Defendants argue that Fed. R. Civ. P. 18(b) permits joinder of contingent claims. That rule is primarily used in the context of joinder of a claim for money owed with one to set aside fraudulent conveyances. Moreover, the New Jersey Supreme Court has spoken definitevely on contingent claims for malicious prosecution.

underlying action prior to the bringing of suit (for malicious prosecution). *Barco Urban Renewal Corp. v. Housing Authority, etc.*, 674 F.2d 1001, 1011 (3d Cir. 1982), citing *The Penwag Property Co., Inc. v. Landau*, 76 N.J. 595 (1978).

*B. Abuse of Process*

Abuse of process is distinguished from malicious prosecution in that an action for abuse of process may be brought before favorable termination of the underlying case and it focuses on the purpose for which an otherwise justifiable process was used. Prosser likens it to using process to extort something from the other party. *See* Prosser, *Law of Torts* p. 898 (3d ed. 1964).

The elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the regular conduct of the proceeding. *Gambocz v. Apel*, 102 N.J. Super. 123, 128 (App.Div. 1968).

Count 2 of the counterclaim alleges that the defendants to that claim conspired to inform third parties that entry of the original preliminary injunction prevented the sale of the screw press in the United States without Enprotech's involvement and threatened FKC Japan and Sato with sanctions for violating the injunction. These unlawful and intentional acts allegedly abused the process of this court. Plaintiffs assert that under their position in the case, FKC Japan and Sato were bound by the original injunction and the fact that they so informed third parties does not constitute abuse of process. Plaintiffs may be able to prove this in defense of the counterclaims, but that is not the issue presently before the Court. The counterclaim adequately alleges the elements of a claim for abuse for process and will not be dismissed under Rule 12(b)(6).

*C. Fraud*

Plaintiffs argue that defendants fail to plead fraud with specificity. Particularly, plaintiffs argue that defendants complain that all counterclaim defendants made the fraudulent misrepresentations regarding Enprotech's alleged exclusive distributorship arrangement with FKC Japan and the fact that FKC Japan was subject to the original preliminary injunction.

The Third Circuit applies a functional and flexible approach to Rule 9(b). ". . . [F]ocusing exclusively on its particularity language is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules." *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir.), *cert. denied*, 469 U.S. 1211 (1985). "Rule 9(b) requires plaintiffs to plead with particularity the 'circumstances' of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior. It is certainly true that allegations of 'date, place or time' fulfill these functions, but nothing in the rule requires them. Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegation of fraud." *Id.*

Here defendants allege that the counterclaim defendants conspired to misrepresent to third parties that FKC Japan was subject to the original preliminary injunction before they were made parties to the action. (Fifth-Party Complaint and Counterclaim at ¶ 13). Defendants also allege that the counterclaim defendants conspired to misrepresent to third parties that Enprotech had an exclusive distributorship arrangement with FKC Japan and third parties could only deal through Enprotech. (*Id.* at ¶¶ 17, 21, 29).

Defendants argue that the record before this Court contains three letters to third parties misconstruing the scope of the original preliminary injunction. Moreover, additional information regarding other incidents, exact statements made and the identity of the third parties to whom they were made is within the unique knowledge of the counterclaim defendants and discoverable by defendants.

Courts have relaxed the particularity requirements where matters are within the adverse parties' knowledge or where the general allegations are accompanied by a statement of the facts upon which the claims are founded. *Chambers Development Co. v. Browning-Ferris Industries*, 590 F. Supp. 1528, 1538 (W.D. Pa. 1984). However, although defendants should be allowed the opportunity to develop their case through discov-

ery, they must support allegations at the filing stage with sufficient factual statements. This their counterclaim fails to do.

The record in this case, even at this early stage, is already voluminous. Copies of discovery documents have been supplied to Mr. De Vos' office. It is defendants' job to cull through those documents in order to allege the facts necessary and sufficient to support a claim for fraud.

*D. Defamation*

Defamation is insult to someone's reputation and good name by uttering false words which tend to hold plaintiff up to contempt, hatred, ridicule, aversion or disgrace. *Hall v. Heavey*, 195 N.J. Super. 590, 594 (App. Div. 1984). Untrue statements relating to misconduct affecting one's business, trade, profession, office or calling are slander *per se* and require no proof of special damages. *Id.* at 595.

Plaintiffs assert that defendants have not pleaded a cause of action for defamation with sufficient specificity. In *Zoneraich v. Overlook Hospital*, 212 N.J. Super. 83, 101 (App. Div. 1986), the court stated, "In the case of a complaint charging defamation, plaintiff must plead facts sufficient to identify the defamatory words, their utterer and the fact of their publication." Here, defendants have identified the essence, although not the exact defamatory words. Defendants claim that the counterclaim-defendants acted in concert and falsely told third parties that FKC Japan and Sato were subject to the original preliminary injunction before being named as parties which damaged their business. (Fifth-party Complaint and Counterclaim at ¶ 13). While not specifically mentioned in the pleadings, in their brief defendants refer to three letters already in the record sent to purchasers and potential purchasers, allegedly misstating the scope of the preliminary injunction. Defendants allege that this is merely the tip of the iceberg and whether these letters are privileged as legal position papers should not be determined at this stage.

The counterclaim alleges that the counterclaim defendants, acting in concert, falsely told third parties that Enprotech had an exclusive distributorship agreement with FKC Japan and

that FKC Japan had conspired to steal the screw press business of Enprotech.

Stating that Enprotech has an exclusive distributorship or that defendants were subject to a preliminary injunction may state a cause of action for fraud or misrepresentation but does not subject defendants to disgrace or ridicule, forming a basis for a cause of action for defamation. However, the statement that defendants "stole Enprotech's screw press business" may be found to be defamatory. Defendants do not state whether the three letters to which they refer include this statement. There is also no indication of who made the statements to whom or when. The counterclaims for defamation are not adequately pleaded.

*E. Tortious Interference with Contractual Relationships.*

The elements of this tort are:

1. A valid contract between the plaintiff and the third party;

2. Defendant's knowledge of the contract,

3. Defendant's intentional procurement of a breach of that contract, and

4. Damages caused by the breach. *Garshman v. Universal Resources*, 824 F.2d 223, 232 (3d Cir. 1987).

Plaintiffs argue that this cause of action fails because defendants have not pleaded the existence of any particular contract with which one or more plaintiffs allegedly have interfered.

Defendants have pleaded FKC Japan had contractual relationships with third parties. Defendants have not, however, identified in their counterclaim any particular contracts for servicing or provision of parts that have been breached. Accordingly, plaintiffs' motion to dismiss this cause of action is also granted.

*F. Tortious Interference with Prospective Economic Advantage.*

The elements of this tort have been set forth in *Zippertubing Co. v. Teleflex, Inc.*, 757 F.2d 1401, 1409-10 (3d Cir. 1985):

(1) The existence of a reasonable expectation of economic advantage or benefit belonging to plaintiff;

(2) Knowledge by the defendant of that expectation;

(3) Defendant's wrongful interference with that expectation of economic advantage without justification;

(4) Causation, that is, that in the absence of the wrongful act of the defendant, it is reasonably probable that the plaintiff would have realized the economic advantage; and

(5) Damages.

Defendants have alleged that plaintiffs wrongfully defamed defendants and misrepresented to third parties the scope of the injunction and the fact of an alleged exclusive distributorship. These acts interfered with and impaired ongoing business relationships. (Fifth-party Complaint at ¶¶ 22, 29). Due to the ongoing nature of these accounts, defendants would have had a reasonable expectation of economic advantage. In Count 6, defendants also allege that plaintiffs did not enter orders with FKC Japan from customers who had contacted them. (*Id.* at ¶ 32). Under the terms of the injunction FKC Japan was forbidden to obtain orders from these customers directly, and plaintiffs' wrongful refusal to enter these orders deprived FKC Japan of reasonable expectation of an economic benefit. This cause of action is properly pleaded, accordingly plaintiffs' motion to dismiss it is denied.

In summary, the following causes of action in the counterclaim survive dismissal: abuse of process or tortious interference with prospective economic advantage. The following causes of action are dismissed: malicious prosecution, tortious interference with contractual relationships, fraud and defamation. However, the dismissal of those claims is subject to their potential reassertion at a later date upon the terms recited by the undersigned in open court and in the order that accompanies this opinion.

*2. Motions to Dismiss as to Kitamura, Ikeda and Sato.*

Kitamura, President of Enprotech and Senior Vice President of C. Itoh (America) and Ikeda, General Counsel of Enprotech,

argue that defendants fail to state a claim against them individually. They cannot be held liable in tort for actions taken on behalf of the corporation absent tortious conduct distinct from their conduct as corporate officers or for persona gain.

> An individual, including a director, officer, or agent of a corporation, may be liable for injuries suffered by third parties because of his torts, regardless of whether he acted on his own account or on behalf of the corporation. "An officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefore."

*AL-Khazraji v. Saint Francis College*, 784 F.2d 505, 518 (3d Cir.), *cert. granted in part on other grounds*, 479 U.S. 812 (1986); *Donas Co., Inc. v. Casper Corp.*, 587 F.2d 602, 603 (3d Cir. 1978); *Katana v. D.E. Jones Commodities, Inc.*, 835 F.2d 966 (2d Cir. 1987).

Defendants have pleaded that the above individual employees conspired to injure FKC Japan's business by disseminating defamatory statements and misrepresentations to third parties. Plaintiff's motion to dismiss Kitamura and Ikeda, individually, is denied.

Similarly, plaintiffs' allegations against Sato are sufficient to subject him to individual liability, if proven. His motion to dismiss is also denied.

*3. Personal Jurisdiction.*

Counterclaim defendants C. Itoh (Japan) and Morita moved to dismiss the fifth-party complaint for lack of personal jurisdiction.

In determining whether this Court may exercise personal jurisdiction over defendants, it must look to the law of New Jersey, the forum in which it sits. *See* Fed. R. Civ. P. 4(e); *Alchemie International, Inc. v. Metal World, Inc.*, 523 F. Supp. 1039, 1042 (D.N.J. 1981). New Jersey's "long arm" rule, New Jersey Court Rule 4:4-4(c)(1), provides for service "consistent with due process of law." The New Jersey courts have determined that Rule 4 provides for personal jurisdiction over non-resident defendants "to the uttermost limits permitted by

the United States Constitution." *Avdel Corp. v. Mercure*, 58 N.J. 264, 268 (1981). Thus, this Court may exercise jurisdiction if it is consistent with the Due Process Clause of the fourteenth amendment.

The Supreme Court, in its recent review of the due process personal jurisdiction inquiry, stated that "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties or relations.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). The exercise of personal jurisdiction comports with due process if the nonresident has contacts with the forum state "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 362 U.S. 310, 316 (1945). Essentially, this Court cannot exert jurisdiction over a non-resident unless his "conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

The Due Process Clause requires that a defendant have "fair warning" of his amenability to the jurisdiction of the foreign sovereign. *Burger King Corp.*, 471 U.S. at 482 (citing *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977)). A defendant is on notice that he is subject to suit when he "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Accordingly, it is the purposeful act of the defendant, not the unilateral activity of another who merely claims a relationship to the defendant, that connects the defendant to the forum. *Id.*

Under this "fair warning" requirement, personal jurisdiction over a non-resident defendant may be asserted in one of two situations. When the plaintiff's claim does not arise out of or is unrelated to the defendant's contacts with the forum, the court may invoke its "general jurisdiction" over any defendant who has maintained continuous and substantial forum affiliations *Dollar Savings Bank v. First Security Bank of Utah*, 746 F.2d 208, 211-12 (3d Cir. 1984) (citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8 & 9 (1984)).

When the plaintiff's claim is related to or arises out of the defendant's contacts with the forum, the court may exercise "specific jurisdiction" if there are "enough contacts with the forum arising out of *that* transaction in order to justify the assertion of jurisdiction over the out-of-state defendant." *Reliance Steel Products v. Watson, Ess, Marshall & Enggas*, 675, F.2d 587, 588 (3d Cir. 1982) (emphasis in original). The burden on the plaintiff to present facts supporting the exercise of jurisdiction is heavier when general as opposed to specific jurisdiction is asserted.

Once a defendant raises a jurisdictional defense, the plaintiff bears the burden of establishing sufficient contacts with the forum state to support personal jurisdiction. *Electro-Catheter Corp. v. Surgical Specialties Instrument Co.*, 587 F. Supp. 1446, 1450 (D.N.J. 1984) (citing *Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A. D'Assurances*, 723 F.2d. 357, 362 (3d Cir. 1983)). The Third Circuit has required that the plaintiff supply sworn affidavits or other competent evidence to sustain that burden. Furthermore, "mere affidavits which parrot and do no more than restate plaintiff's allegations without identification of particular defendants and without factual content do not end the inquiry." *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 66 (3d Cir. 1984). Since the Third Circuit has held that "at no point may a plaintiff rely on the bare pleadings alone in order to withstand defendant's Rule 12(b)(2) motion to dismiss for lack of *in personam* jurisdiction," *id.* at 678 n.9, this Court must examine the sufficiency of the averments contained within the affidavits submitted by the parties.

*A. General Jurisdiction—C. Itoh (Japan)*

The counterclaimants assert that C. Itoh (Japan)'s participation in continuous and systematic contacts with New Jersey should be imputed through the local activities of its subsidiaries, C. Itoh (America) and Enprotech. (Brief in Opp. at 7). In support of their position they rely on the principle that "in assessing personal jurisdiction . . . courts may look to the contacts between the forum and agents of the defendant." *Mari-*

*time International Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1105 (Ct. of Appeals, D.C.), *cert. denied*, 464 U.S. 815 (1983). Defendants attempt to support by affidavit their position that this Court has general jurisdiction over C. Itoh (Japan), the non-resident parent corporation for "[exercising] substantial control over [its] in-state agent[s]." (Brief in Opp. at 8, citing *Florio v. Powder Power Tool Corp.*, 248 F.2d 367 (3d Cir. 1957). The affidavit of plaintiffs' counsel, Andrew W. Heymann, contains the following factual information:

1) George Ikeda, General Counsel and Secretary to Enprotech, described the distribution chain for sale of FKC Screw Presses as follows: "FKC Japan sells to C. Itoh Japan. C. Itoh Japan sells to C. Itoh America. C. Itoh America sells to Enprotech. Enprotech sells to customers." (Heymann Aff., Ex. A; Dep. Tr. 5/22/87).

2. Mr. Kitamura, President of Enprotech and Senior Vice President of C. Itoh (America), stated that during 1984 an employee of either Enprotech or C. Itoh (America), Mr. Ono, was directed to spend 80% of his work time marketing the FKC Screw Press, and that "[o]perationally he does every effort jointly with the C. Itoh Japan." Mr. Kitamura further stated that Mr. Iimura, while employed by C. Itoh (Japan), "was assigned to the subsidiary of C. Itoh Company, Limited, which is C. Itoh America." (Heymann Aff., Exh. B; Dep. Tr., 5/13/87[3])

3. The 1987 Annual Report of C. Itoh & Co., Ltd. (Japan) (Heymann Aff., Exh. C) asserts that C. Itoh (Japan) is "a fully integrated worldwide network of 186 offices in 86 nations. . .". C. Itoh & Co. (America) Inc. is categorized as a trading subsidiary group of C. Itoh & Co. Ltd. (Japan). Annual Report at 30). The C. Itoh (Japan) annual consolidated finan-

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3 The counterclaimants rely on the information contained in ¶¶ 1 and 2 above to show that employees of C. Itoh (America) and Enprotech "pursue business opportunities and solicit sales in New Jersey, for the benefit of the C. Itoh Group and in coordination with C. Itoh (Japan)." (Brief in Opp. at 8.).

cial statements "include the accounts of the company and its significant foreign and domestic trading subsidiaries." (Annual Report at 41).

4. The most recent general report of C. Itoh & Co., Ltd. describes itself as a "comprehensive trading firm" where its 10,000 employees, worldwide, "[act] as antennae to catch information" effecting its commercial interests. (Heymann Aff., Exh. D at 30).

5. The most recent general report of C. Itoh & Co. (America) contains these statements: "Our specialists in 14 locations throughout the United States work in close cooperation with the worldwide resources of our parent company, C. Itoh & Co., Ltd. . . ."

In order to confer jurisdiction over a parent corporation based on the activity of the subsidiary, "the subsidiary which is doing business must be acting as the agent of the parent or the parent must exercise such control over the subsidiary as to make them one entity." *Else v. Inflight Cinema International Inc.*, 465 F. Supp. 1239, 1242-43 (W.D. Pa. 1979). The "mere existence of the parent-subsidiary relationship is not alone a sufficient basis for long-arm jurisdiction of [sic] the parent." *Mizokami Bros. of Arizona, Inc. v. Baychem Corporation*, 556 F.2d 975, 977 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

In order to decide whether C. Itoh (America) and C. Itoh (Japan) are essentially one entity, the Court may consider the same factors used in deciding whether to allow the piercing of a corporate veil. *See Allen v. Toshiba Corp.*, 599 F. Supp. 381 (D.N.M. 1984). These factors were set forth in *Van Dorn Corp. v. Future Chemical & Oil Corp.*, 753 F.2d 565, 570 (7th Cir. 1985), as follows: (1) the failure to maintain adequate corporate records or to comply with corporate formalities, (2) the commingling of funds or assets, (3) undercapitalization, and (4) one corporation treating the assets of another corporation as its own. In addition to the aforementioned factors, the court in *Stephan v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 160-61 (7th Cir. 1963), noted that factors such as whether (1)

the parent finances the subsidiary, (2) the parent corporation pays the salaries or other expenses or losses of its subsidiary, and (3) the directors of the subsidiary do not act independently in the interest of the subsidiary but take orders from the parent corporation, should also be considered in determining whether the requisite control exists. *See also Solomon v. Klien*, 770 F.2d 352 (3d Cir. 1985).

The information set forth in the Heymann affidavit merely illustrates C. Itoh (Japan)'s and C. Itoh (America)'s general utilization of each other's available resources. C. Itoh (Japan)'s issuing of annual consolidated financial statements does not support a finding that C. Itoh (Japan) totally controls C. Itoh (America). *See Matter of Chrome Plate, Inc.*, 614 F.2d 990, 996 (5th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980) ("The filing of a [consolidated] return is insufficient to destroy the separate existence of the corporation.").

The Heymann affidavit simply does not establish the requisite degree of control of the parent over the subsidiary. In fact, the affidavit submitted by Ryujno Morita in support of the motion to dismiss supports the conclusion that the requisite degree of control is lacking here. The affidavit states in pertinent part:

> (a) C. Itoh Japan and C. Itoh America are wholly distinct corporations with separate boards of directors and structure;
>
> (b) C. Itoh America makes its own decisions and exercises control over its own business activities; and
>
> (c) At not time did C. Itoh America act as agent for C. Itoh Japan with respect to matters which are the subject of this action or of the Fifth Party Complaint.

(Morita Aff., ¶ 9).

Accordingly, the Court finds that defendants counterclaimants have failed to meet the burden of establishing the general jurisdiction of this Court over C. Itoh (Japan)[4]

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4 Plaintiffs have not argued the possibility of general jurisdiction over Morita. The Court finds that it lacks general jurisdiction over Morita.

Counterclaimants have requested the opportunity to conduct limited discovery to establish the following jurisdictional facts:

> (1) the control of the stock of C. Itoh (America) and Enprotech by C. Itoh (Japan); (2) the supervision of the activities of the departments of C. Itoh (America) and Enprotech by the corresponding departments of C. Itoh (Japan); (3) day-to-day contact among the companies; (3) [sic] the negotiation of price and other terms in conjunction with the advise [sic] of C. Itoh (Japan); (4) integrated marketing and distribution plans; (5) interlocking directorates; (6) employees of C. Itoh (Japan) are regularly rotated throughout the United States subsidiaries; (7) representations by C. Itoh (Japan) of the United States subsidiaries as overseas offices; (8) close involvement of the parent in the subsidiaries business.

(Brief in Opp. at 9).

The Third Circuit has held that "[w]here the plaintiff's claim is not clearly frivolous, the district court should ordinarily allow discovery on jurisdiction in order to aid the plaintiff in discharging that burden." *Compagnie des Bauxites de Guinee*, 723 F.2d at 362; *Nehemiah v. Athletics Congress*, 765 F. 42, 48 (3d Cir.1985). This liberal standard does not mean, however, that discovery should be allowed in every case where it is requested. *See Garshman v. Universal Resources Holding, Inc.*, 641 F. Supp. 1359 (D.N.J. 1986). In the case at bar, there is not even a sufficient threshold indication of the possibility of such control or disregard of separate corporate existence between C. Itoh (Japan) and its subsidiaries as would warrant the discovery requested.

*B. Specific Jurisdiction*

Defendants argue that C. Itoh (Japan) and Morita are subject to the specific jurisdiction of this Court because:

1) C. Itoh (Japan) availed itself of this forum by commencing this litigation through its controlled United States' subsidiaries.

2) Much of the underlying litigation involves actions in New Jersey of Iimuro, alleged to be a C. Itoh (Japan) employee assignment to the United States.

3) Morita, a C. Itoh (Japan) employee, helped orchestrate the strategy to pursue this lawsuit.

As noted above, the Court does not find that the activities of C. Itoh (Japan) and C. Itoh (America) are so intermingled that it would permit piercing the corporate veil. Where the counterclaimants cannot thereby derive *general* jurisdiction over this foreign defendant, the specific act of a subsidiary's commencing litigation in this forum would not give rise to *specific* jurisdiction. Iimuro's activities in this forum were undertaken either in his capacity as an employee of C. Itoh (America), a New York corporation, or as one of the founders of FKC America, an adversary party. The chain of distribution of the FKC screw press involved FKC Japan selling to C. Itoh (Japan) in Japan, in Japanese currency. C. Itoh (Japan) then sold to its subsidiary C. Itoh (America), a New York citizen. There are no specific allegations as to independent forum-related activity on the part of C. Itoh (Japan) or Morita other than those based upon agency or corporate veil theories which this Court has rejected. Moreover, any alleged conspiracy to abuse process, to interfere with business, or to make misrepresentations involved actions taken by either C. Itoh (Japan) or Morita in Japan, not in New Jersey.

Accordingly, the motions of C. Itoh (Japan) and Morita to dismiss for lack of personal jurisdiction are granted.[5]

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5 Counterclaimants have urged the Court to sustain *in personam* jurisdiction upon the authority of *Cascade Steel Rolling Mills, Inc. v. C. Itoh & Co. (America)*, 499 F. Supp. 829 (D. Ore. 1980). Their argument is basically that because defendants other than C. Itoh (Japan) moved for dismissal due to lack of *in personam* jurisdiction, the latter acknowledged such jurisdiction in Oregon, and thus elsewhere in the Unted States. That C. Itoh (Japan) chose not to contest *in personam* jurisdiction in an antitrust action involving the sale of steel products in Oregon in 1980, has little bearing upon the issue of whether it successfully can contest such jurisdiction over it, in an action involving FKC screw presses, in New Jersey, in 1988. Furthermore, even though the court in *Cascade Steel* found the presence of *in personam* juris-

C. Itoh (Japan) and Morita have also moved for dismissal of the action based upon insufficiency of service of process upon them. Because the Court has granted their motion to dismiss for lack of *in personam* jurisdiction, the motion addressing sufficiency of service is dismissed as moot.

*4. Subject Matter Jurisdiction Over the Counterclaims*

The alignment and citizenship of the remaining parties upon those counterclaims which have survived the motions discussed above are as follows:

| *Counterclaimants:* | *Counterclaim-Defendants.* |
|---|---|
| FKC Japan—Japan | Enprotech—New York and Delaware |
| Hachiro Sato—Japan | C. Itoh (America)—New York |
| | George Ikeda—New Jersey |
| | R. Kitamura—Japan |

Accordingly, there is not complete diversity of citizenship between plaintiffs and all defendants, and thus no independent basis for federal jurisdiction over these counterclaims. The Court must, therefore, consider whether under the concepts of ancillary and/or pendent jurisdiction it should entertain the counterclaims.

Joinder of a new party such as Mr. Kitamura can be accomplished under Fed. R. Civ. P. 13(h) which states:

> (h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or crossclaim in accordance with the provisions of Rule 19 and 20.

With regard to the exercise of ancillary jurisdiction over these parties,

> The ancillary jurisdiction doctrine has even been used to circumvent the diversity requirement in certain situations. *Sheppard v. Atlantic States Gas Co.*, 167 F 2d 841, 845 (3d

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diction in Oregon over other Japanese trading companies, this Court does not feel compelled to reach the same result here. *Miller v. Honda Motor Company Ltd.*, 779 F.2d 769 (1st Cir. 1985) is more persuasive.

> Cir. 1948). For example, persons brought into an action as parties to a *compulsory*, counterclaim will come under the court's ancillary subject matter jurisdiction and the fact the presence of the additional party would destroy diversity does not oust the court of its jurisdiction. *Markus v. Dillinger*, 191 F. Supp. 732, 735 (E.D. Pa. 1961). This result is based on the theory that the diversity which supports the original action also supports the counterclaim against the non-diverse party. *Id.*

*Wheaton Glass Co., etc. v. Pharmex, Inc.*, 548 F. Supp. 1242, 1245-46 (D.N.J. 1982) (emphasis added). The Court must therefore first determine whether the counterclaims are compulsory under the test articulated in *Great Lakes Rubber Corporation v. Herbert Cooper*, 286 F.2d 631 (3d Cir. 1961). Then the Court must decided whether there is ancillary jurisdiction as to the non-diverse defendants on that counterclaim..

> [T]he key factor in determining ancillary jurisdiction over a new party is not whether it intervened or joined, but whether it is a necessary or indispensable party.
>
> * * *
>
> The Court in *City of Orangeburg v. Southern Ry. Co.*, 134 F.2d 890, 894 (4th Cir. 1943), stated the rule as follows: "It has been held that jurisdiction is not lost by . . . intervention or joinder [which destroys complete diversity] if the new parties are not indispensable but merely conditionally necessary parties to the suit . . ." *See* 7 C. Wright & A. Miller, Federal Practice & Procedure § 1610, at 94 (1972).

*N.Y.S. Ass'n for Retarded Children, Inc. v. Carey*, 438 F. Supp. 440, 445 (E.D.N.Y. 1977) (footnotes omitted). The rationale for this rule is:

> There is no ancillary jurisdiction over an indispensable party because an indispensable party should have been a party from the beginning. If the court would have had no jurisdiction over the indispensable party at the commence-

> ment of the suit, the jurisdictional requirements cannot be avoided by adding him later in the proceeding.

*Id.* at n.4. The critical inquiry therefore is first whether newly added non-diverse party (Kitamura) is indispensable. If he is, this Court cannot exercise ancillary jurisdiction over him and the counterclaim would have to be dismissed. If he is not indispensable, the Court can then determine whether or not to exercise jurisdiction over the counterclaims. *That* determination may hinge on whether or not the counterclaims are compulsory counterclaims. Plaintiffs question the viability of pendent-party jurisdiction, so the Court will preliminarily address that matter.

*A. Pendent Party Jurisdiction*

With regard to the non-diverse new party the Court must first address whether pendent-party jurisdiction exists in the Third Circuit. Plaintiffs cite *Lovell Manufacturing v. Export-Import Bank of the United States*, 843 F.2d 725 (3d Cir. 1988), where the court stated that:

> Although we never ruled directly on the availability of pendent-party jurisdiction in this circuit after *Aldinger*, several cases have suggested strongly that such power may not exist at all here.

*Id.* at 731. The court also stated that "at the very least, the *Aldinger* case plainly stands for the proposition that the doctrine of pendent-party jurisdiction should be applied with care." *Id.* That case, however, arose in the context, as did *Aldinger*, of federal-question jurisdiction, where Congress expressed an intention to statutorily limit jurisdiction, not in the context of diversity. Additionally, the federal claims had been dropped from that case. There is, therefore, no clear rule with regard to pendent-party jurisdiction in the Third Circuit.

As noted in *Finkle v. Gulf & Western*, 744 F.2d 1015 (3d Cir 1984), the context in which the non-federal claim is asserted is crucial. *Id.* at 1019. Pendent-party jurisdiction is less favored where plaintiff asserts a claim against a non-diverse defendant, under a theory of indemnification in a Rule 14 context. Here, ancillary jurisdiction arises in the context of Rule 13(h) upon a

counterclaim by defendants, who did not choose the forum initially. Ancillary jurisdiction is most appropriate to protect a defendant haled into federal court against his will from multiple and piecemeal litigation. *Acton Co. Inc. of Massachusetts v. Bachman Foods, Inc.*, 668 F.2d 76, 80 (lst Cir. 1982).

Authority therefore exists for the proposition that ancillary jurisdiction will support non-diverse new parties added to a compulsory counterclaim under Rule 13. Because the Third Circuit has not precluded pendent-party jurisdiction, the Court will review this issue under the traditional analysis.

*B. Indispensable Parties*

As articulated in *Field v. Volkswagenwerk AG*, 626 F.2d 293, 299-300 (3d Cir. 1980):

> [O]nce an issue of a person's compulsory joinder is raised, the court initially must determine in accordance with Rule 19(a) whether:
>
> (1) in his absence complete relief cannot be accorded among those already parties, or
>
> (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations of his claimed interests.

If any of these tests is met, the court is instructed to "order that [the person] be made a party." However, when the joinder of a person satisfies the requirements of Rule 19(a) but that party cannot be joined because he is not subject to service of process or his joinder would deprive the court of jurisdiction, "the court must apply Rule 19(b) in order to determine whether that action may proceed without that person or must be dismissed, 'the absent party being thus regarded as indispensable.' " *Id.*

The factors to be considered in a Rule 19(b) analysis are set forth in the body of the Rule.

> (b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the persons' absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The Court has substantial discretion in deciding whether the action should go forward in the absence of an indispensable party. *Envirotech Corp. v. Bethlehem Steel Corp.*, 729 F.2d 70, 75 (2d Cir. 1984).

This issue can be disposed of promptly. Mr. Kitamura asserts no interest in this action. He has not been realigned a *de facto* plaintiff. He is a defendant to counterclaims where he is sued as a joint tortfeasor. As such he is not an indispensable party defendant to those counterclaims. *Gold v. Johns-Mansville Sales Corp.*, 723 F.2d 1068 (3d Cir. 1983); *Flynn v. Hubbard*, 782 F.2d 1084 (1st Cir. 1986); *Samaha v. Presbyterian Hosp.*, 757 F.2d 529 (2d Cir. 1985); 3A Moore's *Federal Practice* 19-216 *et seq.* and cases cited and discussed therein. Accordingly, the counterclaims will not be dismissed upon any argument that Kitamura is an indispensable party whose joinder on the counterclaim demands its dismissal.

The Court will next consider whether it should exercise ancillary jurisdiction over defendants' counterclaims. As noted above, ancillary jurisdiction is supportable where the party sought to be added is not indispensable and where the claims are compulsory. The Court therefore must determine whether the counterclaims are compulsory.

*ii. Compulsory Counterclaims*

The test for determining whether a counterclaim is compulsory has been set out in *Great Lakes Rubber Corporation v. Herbert Cooper Co.*, 286 F.2d 631 (3d Cir. 1961).

> . . . a counterclaim that arises out of the transaction or occurrence that is the subject matter of an opposing party's claim is a "compulsory counterclaim" within the meaning of Rule 13(a) of the Federal Rules of Civil Procedure.
>
> We have indicated that a counterclaim is compulsory if it bears a "logical relationship" to an opposing party's claim. *Zion v. Sentry Safety Control Corp.*, (3 Cir., 1958, 258 F.2d 31). . . . The phrase "logical relationship" is given meaning by the purpose of the rule which it was designed to implement. Thus, a counterclaim is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts. Where multiple claims involve many of the same factual issues, or the same factual and legal issues, or where they are offshoots of the same basic controversy between the parties, fairness and considerations of convenience and of economy require that the counterclaimant be permitted to maintain his cause of action. Indeed the doctrine of *res judicata* compels the counterclaimant to assert his claim in the same suit for it would be barred if asserted separately, subsequently.

*Id.* at 633, 634.

Here plaintiffs have alleged breaches of a distributorship agreement and fiduciary relationships as well as interference with *their* business. Defendants have alleged that plaintiffs misrepresented the fact of an exclusive distributorship and the scope of the original preliminary injunction, thereby interfering with their business. Defendants also allege that plaintiffs brought this suit in order to force defendants to give them an exclusive distributorship. These claims involve similar facts and legal issues and are offshoots of the same basic controversy. In

*Pochiro v. The Prudential Insurance Company of America*, 827 F.2d 1246 (9th Cir. 1987), the court found that defamation and abuse of process counterclaims were offshoots of the original controversy involving a former employee's alleged misappropriation of confidential information. In *Great Lakes*, the court held that counterclaims repeating the allegations in a dismissed complaint for misappropriation of confidential information, unfair competition and misrepresentation were compulsory counterclaims to claims of antitrust, abuse of process and misrepresentation. 286 F.2d at 632, 633. A counterclaim based on the same transaction or occurrence as the underlying federal claim necessarily has a "common nucleus of operative fact" with that claim. *Abromovage v. United Mine Workers of America*, 726 F.2d 972, 991 (3d Cir. 1984). This Court is satisfied the surviving counterclaims are compulsory and will exercise ancillary jurisdiction over them as to all remaining counterclaim-defendants.

*5. Plaintiffs' Appeal of the Magistrate's Discovery Order Dated June 28, 1988.*

Plaintiff Enprotech appeals the following aspects of Magistrate Haneke's order dated June 28, 1988: (1) that defendants FKC Japan and Hachiro Sato are to make available the documents responsive to plaintiff's First Request for Production of Documents and Things in Japan and not in New Jersey, (2) that defendants were not compelled to adhere to plaintiff's request to categorize the produced documents, and (3) defendants were not ordered to provide plaintiff with any written objections prior to document production in Japan.

As an initial matter, the Court rejects defendants' argument that plaintiff's appeal is untimely and should be denied pursuant to Local Rule 40.D.4. In accordance with Fed. R. Civ. P. 6, the date by which plaintiff had to appeal the magistrate's June 28, 1988 order was July 13, 1988. As such, the appeal which was filed and served on July 11, 1988 was timely.

Under the 1976 Magistrate Act amendments and Local Rule 40, a magistrate may hear and adjudicate motions that are not dispositive of the action itself. On appeal to the district court

judge, such a determination will only be "set aside [if] found to be clearly erroneous or contrary to law." Local Rule 40.D.4(a). The Supreme Court in *Anderson v. City of Bessemer*, 470 U.S. 564 (1985), has articulated the scope of review under the "clearly erroneous" standard:

> a finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L.Ed. 746 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. . . . If the [lower] court's account of the evidence is plausible in light of the record reviewed in its entirety, the [reviewing] court . . . may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

*Id.* at 1511-12 (citations omitted). *See also Robinson v. Lehman*, 771 F.2d 772, 781 (1985).

In support of its first objection, plaintiff argues that Magistrate Haneke ordered production of documents in Japan "despite the fact that FKCJ and Sato presented *no evidence* by way of affidavit showing *any* undue burden imposed upon their client as a result of production in this forum, interposed no timely objections to production in this forum, and sought no Protective Order against production in the State of New Jersey." (Pl. Brief in Support at p. 5) (emphasis in original).

Fed. R. Civ. P. 34(b) provides that a request for production of documents and things "shall specify a reasonable time, place, and manner of making the inspection and performing the related acts." Plaintiff's request had provided that production occur in New Jersey. (Pl. Brief in Support, Exh. C). Rule 34(b) further provides that,

> [T]he response shall state . . . that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. . . . The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Plaintiff asserts that it filed the motion to compel, from which this appeal results, upon defendants' failure to timely respond to plaintiff's request.

If defendants' were in fact timely served with the Request for Production of Documents and if the Request to Produce Documents in New Jersey was deemed burdensome, defendants should have sought a protective order pursuant to Fed. R. Civ. P. 26(c). However, the scope of this appeal is limited to the issue plaintiff pursued below and raised in this appeal, namely, whether the production of documents should be ordered in Japan without an affidavit by defendants stating that production in New Jersey would be burdensome.

Having considered the "general rule that business records should be examined at the place where they are kept, at least where the documents requested are large in number and their production poses some inconvenience," *Petrusha v. Johns-Mansville*, 83 F.R.D. 32, 36 (E.D. Pa. 1979), defendants' representation to the magistrate that "all of the documents [of FKCJ] are maintained in Japan," (Tr. at 5), and that the documents were voluminous and could probably fill three large filing cabinets (Tr. at 10), this Court is not left with a firm conviction that the magistrate committed an error in ordering that the documents be produced in Japan.

In regard to the second and third aspects of plaintiff's appeal, set forth above, the Court agrees with defendants' contention that the issues were never raised by plaintiff in its motion to compel before the magistrate on June 13, 1988. The magistrate's order dated June 28, 1988 states in part: "Fukoku Kogyo Co., Ltd. and Hachiro Sato shall make available for inspecting and copying . . . all documents properly responsive

to Enprotech Corp's First Request for Production of Documents and Things." The order does not specify whether defendants must categorize their responses and whether defendants are required to set forth any written objections in advance of the production of documents in Japan. However, this matter has remained pending long enough and this Court will not remand the parties to the magistrate to address such details. I find the arguments in Mr. De Vos' letter of September 10 persuasive. At least the parties should proceed upon that format in the first instance.[6] One would expect that with their own discovery stayed until the successful completion of the plaintiffs' discovery described in Magistrate Haneke's order, FKC Japan and Sato would have every incentive to facilitate that discovery. The order accompanying this opinion has, of course, adjusted the dates reflected in that of the magistrate.

/s/ JOHN W. BISSELL
John W. Bissell
United States District Judge

DATED: November 4, 1988

6 One exception to this endorsement is the suggestion of Mr. De Vos regarding the production of C. Itoh (Japan)'s documents. That corporation is no longer a party to this action, and any discovery sought from it as a non-party will not be addressed here.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 84-1777

---

ENPROTECH CORP.,

*Plaintiff,*

v.

WILLIAM RENDA, et al.,

*Defendants,*

v.

C. ITOH & COMPANY (AMERICA), INC.,

*Defendant on Counterclaim.*

---

C. ITOH & COMPANY (AMERICA), INC.,

*Fourth-Party Plaintiff,*

v.

SAKAE IIMURO, et al.,

*Fourth-Party Defendants.*

---

FUKOKU KOGYO LTD. and HACHIRO SATO,

*Fifth-Party Plaintiffs and Counterclaimants,*

v.

ENPROTECH CORP. and C. ITOH & COMPANY (AMERICA), INC.,

*Defendants on Counterclaim,*

and

C. ITOH & COMPANY (JAPAN), INC., R. MORITA, GEORGE IKEDA and RYUJI KITAMURA,

*Fifth-Party Defendants.*

ORDER

Pursuant to the various motions of several parties adjudicated by the Court as set forth in its Opinion of even date herewith,

It is on this 4th day of November, 1988, ORDERED that:

1. The motions to dismiss the counterclaims asserted by Fukoku Kogyo Ltd. and Hachiro Sato for abuse of process and tortious interference with prospective economic advantage be and the same hereby are denied;

2. The motion to dismiss said parties' counterclaim for malicious prosecution be and the same hereby is granted because that claim is, at best, premature;

3. The motions to dismiss the counterclaims for tortious interference with contractual relationships, fraud and defamation are granted, without prejudice to the right of said counterclaimants to formally move before this Court, not later than 20 days after the completion of discovery on all other claims which persist throughout the litigation, for leave to replead their claims for fraud, defamation or tortious interference with contractual relationships should said discovery or other factual developments reveal that there is a basis in fact for such claims, or any of them, and that they can be adequately pleaded;

4. Plaintiffs' motion to dismiss claims against Messrs. Kitamura and Ikeda, individually, be and the same hereby is denied;

5. Sato's motion to dismiss any claims asserted against him in his individual capacity be and the same hereby is denied;

6. The motions of the counterclaim defendants C. Itoh (Japan) and R. Morita to dismiss all claims against them for lack of *in personam* jurisdiction be and the same hereby are granted and said claims are dismissed as to those two parties;

7. The motions of C. Itoh (Japan) and R. Morita to dismiss all claims against them for insufficiency of service of process are dismissed as moot, in light of the granting of their motion to dismiss for lack of *in personam* jurisdiction;

8. The additional motions of plaintiffs and counterclaim defendants to dismiss the remaining claims in the counterclaim and "fifth-party complaint" for lack of subject matter jurisdiction are denied;

9. The appeal of the plaintiff Enprotech from various aspects of the order of the Honorable G. Donald Haneke, United States Magistrate, dated June 28, 1988 is in all respects denied and that order is affirmed; however, due to the passage of time while this appeal was before the Court, the term "the date of this Order" where it appears in the first two decretal paragraphs of said Order is hereby amended to read "November 1, 1988."

/s/ JOHN W. BISSELL

John W. Bissell
United States District Judge

## Appendix D

RULE 4. Process

(a) Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

(b) Same: Form. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of the defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint. When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.

(c) Service.

(1) Process, other than a subpoena or a summons and complaint, shall be served by a United States marshal or deputy United States marshal, or by a person specially appointed for that purpose.

(2)(A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age.

(B) A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshal or deputy United States marshal, or by a person specially appointed by the court for that purpose, only—

(i) on behalf of a party authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. § 1915, or of a seaman authorized to proceed under Title 28, U.S.C. § 1916,

(ii) on behalf of the United States or an officer or agency of the United States, or

(iii) pursuant to an order issued by the court stating that a United States marshal or deputy United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.

(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

(D) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.

(E) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

(3) The court shall freely make special appointments to serve summonses and complaints under paragraph (2)(B) of this subdivision of this rule and all other process under paragraph (1) of this subdivision of this rule.

(d) Summons and Complaint: Person to be Served. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action

attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(e) Summons: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when

authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

(g) Return. The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or deputy United States marshal, such person shall make affidavit thereof. If service is made under subdivision (c)(2)(C)(ii) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. Failure to make proof of service does not affect the validity of the service.

(h) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(i) Alternative Provisions for Service in a Foreign Country.

(1) *Manner.* When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service

in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to the individual personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) *Return.* Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

## Appendix E

4:4-4. Summons; Personal Service; In Personam Jurisdiction

Service of summons, writs and complaints shall be made as follows:

(a) Individuals Generally.

(1) *Personal Service.* Upon an individual other than an infant under 14 years of age or an incompetent person, by delivering a copy of the summons and complaint to him personally; or by leaving a copy thereof at his dwelling house or usual place of abode with a competent member of his household of the age of 14 years or over then residing therein; or by delivering a copy thereof to a person authorized by appointment or by law to receive service of process on his behalf.

(2) *Optional Mailed Service.* In lieu of personal service prescribed by subparagraph (1), service may be made by registered, certified or ordinary mail, which shall be effective only if the party served answers or otherwise appears in response thereto. If defendant does not appear within 60 days following mailed service, service shall be made as is otherwise required by this rule, and the time prescribed by R. 4:4-1 for issuance of the summons shall then begin to run anew.

(b) Infants Under 14 and Incompetents.

(1) *Infants.* Upon an infant under 14 years of age, by delivering a copy of the summons and complaint personally to his father, mother or guardian of his person or a competent adult member of his household with whom he resides, or if service cannot be made upon any of them, then as provided by court order. The requirement of service of process or notice upon a father, mother, guardian or adult, common to more than one infant defendant in any action, shall be deemed complied with by service upon such person of one copy of the summons and complaint or other notice served.

(2) *Incompetents.* Upon an incompetent person, by delivering a copy of the summons and complaint personally to the

guardian of his person or a competent adult member of his household with whom he resides or, if he is living in an institution, then the director or chief executive officer of the institution, or if service cannot be made upon any of them, then as provided by court order; and, unless the court otherwise orders, also to the incompetent.

(c) Corporations, Partnerships and Associations.

(1) *Corporations.* Upon a domestic or foreign corporation, by serving, in the manner prescribed in paragraph (a), either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

(2) *Associations and Partnerships.* Upon an unincorporated association which is subject to suit under a recognized name and upon a partnership, by serving, in the manner prescribed in paragraph (a), an officer, a managing or general agent, or, in the case of a partnership, also a partner, or, if it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts, that after diligent inquiry and effort, service cannot be made upon any of the foregoing, then, consistent with due process of law, by mailing, by registered or certified mail, return receipt requested, a copy of the summons

and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

(3) *Alternate Mode of Service.* If the addressee refuses to claim or to accept delivery of registered or certified mail, service may be made by ordinary mail addressed to him. If for any other reason delivery cannot be made, then service of a copy of the summons and complaint may be made outside this State as provided in R. 4:4–5(a) upon any person whom service is authorized by the law of this State or of the state wherein service is effected.

(d) Individuals Doing Business or Having Interest in Real Property.

(1) *Proprietorships.* Upon an individual engaged in a business within this State in an action arising out of the conduct of such business, by serving, in the manner prescribed in paragraph (a) the individual, or a managing or general agent of the individual employed in such business; or if service cannot be made upon any of the foregoing, by serving any servant of the individual within this State acting in the discharge of his duties in connection with such business.

(2) *Persons Having an Interest in Real Property.* Upon an individual owning or having an interest in real property in this State in an action arising out of such ownership or interest, by serving, in the manner prescribed in paragraph (a), the individual, or a managing or general agent of the individual employed in the management of such real property.

(e) Substituted Service on Certain Individuals. On the filing of an affidavit of the attorney for the plaintiff or of any person having knowledge of the facts, that, after diligent inquiry and effort, an individual cannot be served in this State under any of the preceding paragraphs of this rule, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to the individual addressed to his dwelling house or usual place of abode or, with postal instructions to deliver to addressee only, to his place of business or

employment. If the addressee refuses to claim or to accept delivery of registered or certified mail, service may be made by ordinary mail addressed to him at his dwelling house or usual place of abode. The party making service may, at his option, make service simultaneously by registered or certified mail and ordinary mail, and if the addressee refuses to claim and accept delivery of registered mail and if the ordinary mailing is not returned, the simultaneous mailing shall constitute effective service. If for any other reason delivery cannot be made, then service may be made outside the State as provided in R. 4:4-5(a) upon any person upon whom service is authorized by the law of this State or of the state wherein service is effected.

(f) State of New Jersey. Upon the State of New Jersey, by registered, certified or ordinary mail or by delivering a copy of the summons and complaint personally pursuant to R. 4:4-4(a)(1) to the Attorney General or to any person in his office designated by him in a writing filed with the Clerk of the Superior Court. No default shall be entered for failure to appear unless personal service has been made under this paragraph. In an action under N.J.S. 2A:45-1 et seq. (lien or encumbrance held by the State) the notice in lieu of summons shall be in the form, manner and substance prescribed by N.J.S. 2A:45-2, and shall be served, together with a copy of the complaint upon the Attorney General or any person in his office designated by him in writing filed with the Clerk of the Superior Court, but if the lien or encumbrance arises by reason of a recognizance entered into in connection with any proceeding in any county court or any criminal judgment rendered in such court, the notice, together with a copy of the complaint shall be served upon the county prosecutor or upon any person in his office designated by him in writing filed with the county court.

(g) Public Bodies. Upon any county, municipality, or other public body, by delivering a copy of the summons and complaint personally pursuant to R. 4:4-4(a)(1) to the presiding officer or to the clerk or secretary thereof.

(h) As Provided by Law. Upon any defendant, as may be provided by law.

(i) Court Order. If service can be made by any of the modes provided by this rule, no court order shall be necessary. If service cannot be made by any of the modes provided by this rule, any defendant may be served as provided by court order, consistent with due process of law.

(2)

No. 89-308

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

FUKOKU KOGYO CO., LTD. AND HACHIRO SATO,

*Petitioners*,

—v.—

C. ITOH & CO., LTD.,

*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Elizabeth M. Taylor
(*Counsel of Record*)
CONNELL & TAYLOR
535 Fifth Avenue
New York, New York 10017
(212) 490-1010

*Attorneys for Respondent*

September 1989

9pp

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:** PAGE



**Court Rules:**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

**No. 89-308**

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FUKOKU KOGYO CO., LTD. AND HACHIRO SATO,

*Petitioners,*

—v.—

C. ITOH & CO., LTD.,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### COUNTERSTATEMENT OF THE CASE

Respondent/additional counterclaim defendant C. Itoh & Co., Ltd. ("C. Itoh Japan") respectfully submits this brief in opposition to the petition for writ of certiorari to review the dismissal of all claims against C. Itoh Japan for lack of *in personam* jurisdiction. The reasons for such dismissal are set forth in the decision dated November 4, 1988 of the United States District Court for the District of New Jersey, which was affirmed, without opinion, by order dated June 21, 1989 of the United States Court of Appeals for the Third Circuit.[1]

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1 The district court decision and Third Circuit order are set forth in Appendices C and A, respectively, to the Petition.

The district court correctly found that C. Itoh Japan, a Japanese trading company with its principal place of business in Japan, had not engaged in activities in New Jersey so as to make it subject to the specific jurisdiction of the court, nor did it have direct physical presence in New Jersey upon which general jurisdiction could be based. After examination of evidence as to the relationship between C. Itoh Japan and its wholly owned subsidiary, C. Itoh & Co. (America) Inc. ("C. Itoh America", a New York corporation which does business in New Jersey),[2] the district court further held that general jurisdiction over C. Itoh Japan could not be predicated on the New Jersey activities of its subsidiary, C. Itoh America. Specifically, the district court held that the "requisite degree of control" by C. Itoh Japan over C. Itoh America for the exercise of personal jurisdiction was lacking. (Decision, 16c-17c).

It is petitioners' contention that this Court should review the finding that *in personam* jurisdiction over C. Itoh Japan cannot be predicated on the New Jersey activities of C. Itoh America. There is, however, no reason for granting the petition, for the considerations set forth in United States Supreme Court Rule 17.1 are notably absent.

In an effort to persuade this Court that the decision below is somehow in conflict with decisions of other circuits, petitioners have resorted to the basest of tactics; they have chosen to misstate to this Court the content of the decision below. Specifically, the petition represents that the decision below (a) rested its holding upon *Cannon Manufacturing Co. v. Cudahy Pack-*

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2 C. Itoh Japan has numerous wholly owned subsidiaries throughout the world, including C. Itoh America. In addition to the wholly owned subsidiaries, C. Itoh Japan also holds at least a 20 percent interest in the following entities: American Isuzu Motors, Inc.; Isuzu Truck of America, Inc.; ATR Wire & Cable Co., Inc.; Mazda Motors (Deutschland) G.m.b.H.; Mitsui-C. Itoh Iron Pty., Ltd.; Kobe Alumina Associates (Australia) Pty., Ltd.; Mazda Canada Inc.; Industrias Unidas, Sociedad Anomina; Ayaha Industry K.K.; Takiron Co., Ltd.; C. Itoh Fuel Co., Ltd.; Nisseki-C. Itoh Petroleum Co.; Sanko Paper Co. Ltd.; Shibushi Silo Co.; Japan Communication Satellite Co.; Nikko Shoji K.K.; Fuji Oil Co., Ltd.; Morita Industry; Sanko Steel Industry; Relian K.K.; Nishi-Hiroshima Developing Co., Ltd.; and Sunny K.K.

*ing Co.*, 267 U.S. 333 (1925), and (b) thereby precluded "an analysis of the nature and degree of control of the activities of the domestic subsidiary by the foreign parent" on the question of *in personam* jurisdiction over the foreign parent (C. Itoh Japan). (Petition, i, 1, 4-10).

As will be shown below, these representations as to the content of the decision below are false. The decision not only did not rest on *Cannon Manufacturing*, it did not even cite *Cannon Manufacturing*. Moreover, it utilized the very "control" analysis which petitioners claim was precluded by purported reliance on *Cannon Manufacturing*.

The present case is not an appropriate vehicle for this Court to reexamine *Cannon Manufacturing*.

## REASONS FOR DENIAL OF THE PETITION AND FOR AWARD OF DAMAGES

### POINT I

### PETITIONERS' ARGUMENT THAT THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS IS PREDICATED ON A MISSTATEMENT OF THE DECISION BELOW.

Petitioners' argument that there is a conflict between the circuits is predicated on the premise that the decision below relied on *Cannon Manufacturing*, thus "precluding an analysis of the nature and degree of control of the activities by the foreign parent". (Petition, i, 1). Petitioner further contends that by relying on *Cannon Manufacturing*, the court below failed to take into consideration the due process standards of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). (Petition, i, 4, 9).

The argument is fallacious for at least three reasons. Contrary to petitioners' assertions, the decision below: (1) did not rest on *Cannon Manufacturing*, (2) did in fact address the degree of control by the C. Itoh Japan over its subsidiary, and (3) did take into account the due process standards of *International Shoe* and its progeny.

With respect to the first point, petitioners' repeatedly stating that the decision below rested on *Cannon Manufacturing* (*see, e.g.*, Petition, i, 1, 4) does not make it true. The decision did not even cite *Cannon Manufacturing*.

Second, the argument that *Cannon Manufacturing* precluded "an analysis of the nature and degree of control of the activities of the domestic subsidiary by the foreign parent" (Petition, i, 1) is equally fallacious. The court below in fact applied a "control" test to determine whether personal jurisdiction could be exercised over C. Itoh Japan on the basis of C. Itoh America's activities. More specifically, it utilized the following test for the exercise of personal jurisdiction:

> "[t]he subsidiary which is doing business must be acting as the agent of the parent or the parent must exercise such *control* over the subsidiary as to make them one entity. *Else v. Inflight Cinema International Inc.*, 465 F.Supp. 1239, 1242-43 (W.D. Pa. 1979)" (emphasis added) (Decision, 15c)

In determining whether C. Itoh Japan exercises such control over C. Itoh America as to make them "essentially one entity", the district court considered factors similar to those used in deciding whether to allow piercing the corporate veil. The court then analyzed evidence submitted by affidavits on both sides regarding the relationship between the two companies. On the basis of such analysis, it found both the "requisite degree of control" by C. Itoh Japan over C. Itoh America and the requisite "disregard of separate corporate existence" for the exercise of personal jurisdiction to be lacking. (Decision, 17c)

Third, the suggestion that the district court disregarded the due process standards of *International Shoe* and its progeny is also without merit. The decision itself began with a review of the due process standards for the exercise of personal jurisdiction over a nonresident. Among the United States Supreme Court decisions cited and relied upon below were: *International Shoe*, *supra*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S.

286 (1980), *Shaffer v. Heitner*, 433 U.S. 186 (1977), *Hanson v. Denckla*, 357 U.S. 235 (1958), and *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984). (Decision, 12c-13c).

In summary, petitioners' contentions as to why this Court should grant a writ of certiorari are based on misstatement of the decision below. The decision below raises no conflict between the circuits. We respectfully submit that this Court should not exercise its discretion to review it.

## POINT II

## DAMAGES SHOULD BE AWARDED TO RESPONDENT.

United States Supreme Court Rule 49.2 provides for the award to respondent of appropriate damages when a petition for writ of certiorari is "frivolous". In view of petitioners' arguments predicated on *Cannon Manufacturing*, characterizing of the petition as merely "frivolous" would seem charitable. We respectfully submit that an award of damages to C. Itoh Japan under United States Supreme Court Rule 49.2 is appropriate.

## CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court deny the petition for writ of certiorari and award damages, pursuant to United States Supreme Court Rule 49.2, to respondent C. Itoh Japan.

Dated: September 25, 1989

Respectfully submitted,

/s/ ELIZABETH M. TAYLOR
Elizabeth M. Taylor
(*Counsel of Record*)
CONNELL & TAYLOR
*Attorneys for Respondent*
*C. Itoh & Co., Ltd.*
535 Fifth Avenue
New York, New York 10017
(212) 490-1010